ASIA COMMERCIAL FINANCE (M) BHD.

v.

LEENG LAND SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LC VOHRAH J
[ORIGINATING SUMMONS NO. F 600 OF 1982]
28 APRIL 1983

LAND LAW: *Foreclosure proceedings - Order for sale - Application to stay proceedings - Dismissal of application - Jurisdiction of Court - Appeal - Whether order should be stayed pending appeal.*

The defendants applied for stay of proceedings in respect of an order for sale. The application was dismissed on the ground that the Judge was *functus officio* and therefore had no jurisdiction to grant an order for stay once an order for sale had been made. The defendants filed notice of appeal and at the same time applied for stay of the order of sale and all further proceedings pending the appeal.

Held:
The special circumstances of the case justify the Court's granting a stay of proceedings for sale pending the appeal:

[1] There was a point of law to be decided as to whether a Judge is *functus officio* and had no jurisdiction to hear an application for stay in foreclosure proceedings under the National Land Code.

[2] The order for sale might be in conflict with an order for injunction already granted and which had not been vacated.

[3] Unless stay was granted, the appeal would be rendered nugatory by the destruction of its substratum upon the sale of the land.

[Application for stay allowed.]

Case referred to:
Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1976] 1 MLJ 131

For the plaintiffs - M. Chang
For the defendant - S.S. Muker
For the intervenor - Zainur Zakaria

JUDGMENT

LC Vohrah J:

Peh Swee Chin J on 18 November 1982 made an order in terms of the originating summons (Encl. 2) for the land in this matter to be sold by public auction. On 23 March 1983 the defendants applied for an order to stay proceedings in respect of this order for sale on their undertaking to discharge their outstanding interest on the loan advanced by the plaintiffs by instalment payments with the stipulation that the stay would be removed if they should default in their instalment payments (See Encl. 17). This application was dismissed by Abdul Razak J on 24 March 1983 on the ground, as alleged by Counsel for the defendants (See para. 2 of Encl. 23), "that the Court had no jurisdiction to grant an order for stay once an order for sale had been made in respect of charged property" because he was *functus officio.*

The defendants filed a notice of appeal against this decision of Abdul Razak J and then on 18 April 1983 applied to me by summons-in-chambers (See Encl. 24) for Peh Swee Chin J's order of sale and for all further proceedings thereon to be stayed pending the hearing of the appeal. I granted an order in terms of this application for stay pending appeal for the following reasons. Firstly, I was of the view that the defendants had shown merits in establishing in para. 4 of their affidavit in support (See Encl. 23) that there is a point of law to be decided by the Federal Court as to whether or not a Judge is *functus officio* and has no jurisdiction to hear an application for stay in foreclosure proceedings under the National Land Code once an order for sale has been made by the Court. Secondly, I was of the view that the order for sale granted by Peh Swee Chin J. on 18 November 1982 might be in conflict with N.H. Chan J's order made on 13 July 1982 in Civil Suit No. C. 582 of 1982 at the instance of the intervenors as plaintiffs in that suit (See 'LKK1' and 'LKK4' exhibited to Encl. 20) whereby the defendants were restrained by injunction "from dealing with, or engaging in any transactions relating to the development" of the said land until the early trial of the said suit. This order of N.H. Chan J has not been vacated and, although the injunction is directed specifically against the defendants, it was issued clearly for the purpose of protecting the interests of the intervenors. I accordingly had doubts as to the effectiveness of the order for sale granted by Peh Swee Chin J in the face of this injunction. Thirdly, I was of the view that unless a stay was granted in this case the appeal would be rendered nugatory by the destruction of its "substratum" upon the sale of the land [See *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 MLJ 131 at p. 132]. In the result I was satisfied that the defendants had shown special circumstances to justify my granting a stay of the proceedings for sale by public auction pending the hearing of the appeal in the Federal Court.

Also found at [1983] 2 CLJ 24